(emphasis in original).

2. Petitioners Briefed The Anti-Cutback Statute To The First Circuit.

Hancock next argues that Petitioners failed to adequately preserve its Anti-Cutback Statute argument. Opp. Br. at 22. However, Hancock admits that Petitioners repeatedly "mentioned" the Anti-Cutback statute in its opening brief before the First Circuit. *Id.* In fact, Petitioners entire argument was premised on the Anti-Cutback Statute, as demonstrated by the following first two paragraphs of the "Argument" section of Petitioners' brief in the First Circuit:

> As Participants under Hancock's ERISA-qualified Pension Plan who have achieved 25 years of service at Hancock, Plaintiffs accrued the right to receive Enhanced Benefits, including an unreduced pension commencing at age 56 – or as early as age 50 reduced from age 56 – as well as lifetime medical insurance and other benefits. This right is based upon the plain language of an October 11, 1994 Pension Plan Amendment, both standing alone and when construed together with the Summary Plan Descriptions and other Plan provisions. It is also accords with a mountain of contemporaneous evidence.
>
> Having already granted these benefits to Plaintiffs, Hancock cannot now take them away. 29 U.S.C. § 1054(g) ("The accrued benefit of a participant under a plan may not be decreased by . . . eliminating or

> reducing an early retirement benefit."); *Bellas v. CBS, Inc.*, 221 F.3d 517, 524 (3rd Cir. 2000) ("There is no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit that is protected by [29 U.S.C. § 1054(g)]."). The protection of accrued benefits stands at the very heart of ERISA: "Congress's chief purpose in enacting [ERISA] was to ensure that workers receive promised pension benefits upon retirement." Id, 221 F.3d at 521. *See also, e.g., Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2nd Cir. 2001) ("Congress intended that ERISA function as a comprehensive remedial statute designed to safeguard pension benefits."), *citing* 29 U.S.C. § 1001 (statement of purpose).

Appendix hereto at 73a to 74a.

In addition, Hancock fails to mention that Petitioners filed in the First Circuit a *Petition for Rehearing and Suggestion for Rehearing En Banc*, which further fleshed out the arguments in exacting detail. *See* Appendix hereto at 75a to 84a.

3. The "Reliance" Issue Is Ripe Under Law-Of-The-Case Principles.

In remanding the case to the District Court, the First Circuit instructed as follows: "On remand, the issue of reliance may be relevant to the former employees' second count claiming breach of fiduciary duty under *Mauser v. Raytheon Co. Pension Plan*, 239 F.3d 51, 54-58 (1st Cir. 2001)." App. 16a. In opposing certiorari,

Hancock argues that the reliance question is not ripe, because Petitioners could prevail by proving reliance on remand. Opp. Br. at 26-27. There are two problems with Hancock's position. First, Petitioners would be harmed by having to go to trial to prove reliance even though that may not be required under ERISA, and by then having to again endure multiple layers of appeal should they fail to satisfy the District Court. Second – and more importantly here – Petitioners are advised to have the issue addressed now under established "law-of-the-case" principles. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 52 n. 7 (1987) (the lower court "already . . . considered and resolved this issue in their earlier proceedings; if the Commonwealth were to raise it again in a new set of appeals, the courts below would similarly reject the claim under the law-of-the-case doctrine.").

CONCLUSION

For the foregoing reasons and those previously briefed, this petition should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)
Nos. 02-1960, 03-1277, 03-1278

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EILEEN CHEEVER; ANTHONY COSTANZO;
MARY ANN DIEBOLD; ROSEMARY GIBSON;
EDITH NEIL; MARILYN NUSS;
SUSAN OIKELMUS
Plaintiffs-Appellees/Cross-Appellants

KAREN FENTON; JEANNE RANDOLPH;
KATHLEEN WAGNER,
Plaintiffs,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, as the Administrator of the John Hancock
Mutual Life Insurance Company Pension Plan,
Defendant-Appellant/Cross-Appellee

On Appeal From a Judgment of the
United States District Court for the
District of Massachusetts

OPENING BRIEF OF THE PLAINTIFF-
APPELLEES EILEEN CHEEVER, ANTHONY
COSTANZO, MARY ANN DIEBOLD, ROSEMARY
GIBSON, EDITH NEIL, MARYILYN NUSS
and SUSAN OIKELMUS

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* * *

ARGUMENT

HAVING ACHIEVED 25 YEARS OF SERVICE AT HANCOCK, PLAINTIFFS ACCRUED THE RIGHT TO RECEIVE ENHANCED EARLY RETIREMENT BENEFITS UNDER THE PENSION PLAN

As Participants under Hancock's ERISA-qualified Pension Plan who have achieved 25 years of service at Hancock, Plaintiffs accrued the right to receive Enhanced Benefits, including an unreduced pension commencing at age 56 - or as early as age 50 reduced from age 56 - as well as lifetime medical insurance and other benefits. This right is based upon the plain language of an October 11, 1994 Pension Plan Amendment, both standing alone and when construed together with the Summary Plan Descriptions and other Plan provisions. It is also accords with a mountain of contemporaneous evidence.

Having already granted these benefits to Plaintiffs, Hancock cannot now take them away. 29 U.S.C. § 1054(g) ("The accrued benefit of a participant under a plan may not be decreased by ... eliminating or reducing an early retirement benefit."); Bellas v. CBS, Inc., 221

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Nos. 02-1960, 03-1277, 03-1278

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COMPANY, as the Administrator of the John Hancock
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Defendant-Appellant/Cross-Appellee

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District of Massachusetts

APPELLEES' PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

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REASONS FOR GRANTING THE PETITION

A. The Court's Decision Violates ERISA's Anti-Cutback Statute (20 U.S.C. § 1054(g)), and Conflicts with Other Decisions From Within and Outside the First Circuit.

1. The Court's Decision Violates the Anti-Cutback Statute.

By restricting review to Hancock's post-claim "interpretation" of the so called 1995 Restatement, and barring review of the 1994 Amendment, the SPDs, or other surrounding evidence, the Court allows Hancock to deny early retirement benefits that have already accrued. This violates ERISA's anti-cutback statute, 29 U.S.C. § 1054(g)("The accrued benefit of a participant under a plan may not be decreased by. . . eliminating or reducing an early retirement benefit.").n1

The facts tell the story. On October 11, 1994, Hancock approved an amendment to the Pension Plan. A01362-63 (the "1994 Amendment"). The 1994 Amendment effected a "liberalization" to the Pension Plan by guaranteeing "unreduced pension benefits ... for anyone with at least 25 years of service." A01570, A02015. The 1994 Amendment plainly stated that all

"Participants" with 25 years of service "shall be entitled" to a full pension payable commencing at age 56 without having to meet any other eligibility criterion. A01362. Commensurate with adopting the 1994 Amendment, Hancock launched a blitz of communications to inform Participants of their new rights. In each such communication, Hancock plainly stated that Participants with 25 years of service would henceforth qualify for a full pension at age 56, without any other conditions imposed. A01570 (Speech by Hancock Chairman/CEO Stephen Brown); A01549 (letter to all employees); A01553 ("Early Retirement Guide"); A01264 (SPD). Hancock further promised that the new rule would apply to all "retirements or terminations after January 1, 1995." A01264, A01290, A01550, A01552.

As Appellees achieved 25 years of service, their right to an unreduced pension at age 56 accrued and became protected by the anti-cutback statute, 29 U.S.C. § 1054(g). See Campbell v. BankBoston, 327 F.3d 1, 8 (1st Cir. 2003) ("The ERISA anti-cutback provision protects against the erosion of 'accrued benefits'"), See also, e.g., Bellas v. CBS, Inc., 221 F.3d 517, 524 (3rd Cir. 2000) ("There is no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit that is protected by [29 U.S.C. § 1054(g)]."); Herzberger v. Standard Ins. Co., 205 F.3d 327, 332-33 (7th Cir. 2000) ("An employer should not be allowed to get credit with its employees for having an ERISA plan that confers solid rights on them and later, when an employee seeks to enforce the right, pull a discretionary judicial review rabbit out of his hat."); Williams v. Cordis Corp., 30 F. 3 d 1429, 1431 (11th Cir.

1994) (anti-cutback rule "prevent[s] employers from 'pulling the rug out from under' employees participating in a plan").

After learning their employment would soon be terminated as part of the sale of their employing unit to another company, Appellees submitted claims for unreduced pension benefits at age 56. Hancock denied the claims based upon a new "interpretation" of the 1995 Restatement. This lawsuit followed.

The District Court carefully reviewed of the 1995 Restatement, both standing alone and when viewed in context of the 1994 Amendment, the SPDs, and other relevant evidence, finding Hancock's "interpretation" untenable:

> "The Administrator's interpretation ... renders substantial portions of §§ 4.3(B) and 8.1(A) [of the 1995 Restatement] superfluous and imports a definition of 'employee' that is inconsistent with its use elsewhere in the Plan. It is further inconsistent with the reading given to the Plan by Hancock's own CEO and its Human Resources Department ... [O]bstinacy in error is the soul of capriciousness."

Dist. Ct. Op. at 17.

In reversing, the Court held that the District Court should not have reviewed any documents save for the 1995 Restatement: "With the governing plan document identified, extraneous documents are

irrelevant to our determination of the former employees' right to relief under Count I" Slip Op. at 12. The problem with such streamlined review, however, is that it allows Hancock - under the guise of "interpreting" the 1995 Restatement - to deny early retirement benefits that have already accrued, in violation of the anti-cutback statute, 29 U.S.C. § 1054(g).

In Cent. Laborers' Pension Fund v. Heinz, the Supreme Court held that the anti-cutback statute bars pension plan amendments that reduce eligibility for early retirement benefits that have already been "earned by service." 541 U.S. 739, 124 S. Ct. 2230, 2235 (2004). n2 The Supreme Court clarified that only new "conditions set before a benefit accrues can survive the anti-cutback rule." Id.

As held by the District Court, the record in this case proves that Hancock's new "interpretation" flatly contradicts its initial intent in approving and publishing the 1994 Amendment, as well as its prior interpretation of the 1994 Amendment both before and after the 1995 Restatement was created (see Subsection 5, below). n3 Accordingly, rehearing is required.

2. The Court's Decision Creates a Split Within the First Circuit.

By holding that 29 U.S.C. § 1132(a)(1)(B) mandates review restricted only to the 1995 Restatement - and nothing else, the Court has created a split of authority within this Circuit. In another recent decision under § 1132(a)(1)(B), this Court called for

case-by-case evaluation of the "weight and admissibility" of other plan-related document:

> "Such documents are most likely to be relevant where they have been authenticated, have been generated or adopted by the plan administrator, concern the policy in question, are timely to the issue in the case, are consistently used, and were known. . . by those who made the decision to deny the claim. Where a plan administrator has chosen consistently to interpret plan terms in a given way, that interpretation is relevant in assessing the reasonableness of the plan administrator's decision."

Glista v. UNUM Life Ins. Co., 378 F.3d 113, 123 (1st Cir. 2004), *citing* Doe v. Travelers Ins. Co., 167 F.3d 53, 57 (1St Cir. 1999).

Contrary to the plain holding of Glista, this Court uses a per se rule that only one document - the 1995 Restatement - can be considered. The Court also ignores other ERISA authorities confirming the reviewing court's authority, when construing underlying plan documents, to review (at least) the relevant SPDs. See Pl. Br., 20 n. 9, *citing* (inter alia) Matthews v. Sears Pension Plan, 144 F.3d 461, 468 (7th Cir. ("[SPDs are] a presumptively reliable guide to the contents of the plan itself."), cert. denied, 525 U.S. 1054 (1998). n4

The important legal principles involved overshadow any factual differences existing between

this case and Glista. As a result, District Courts (and plan participants) now lack clear guidance in this area. Rehearing is thus required.

3. The Court's Decision Conflicts with the "Grow Into" Rule.

Hancock's post-claim interposition of an "active service at age 50" requirement violates the established rule that Appellees should be allowed to "grow into" their early retirement benefits:

> "The courts of appeals that have ruled on an employee's right to 'grow into' early retirement benefits have ... uniformly held that as long as an employee satisfies, or will be able to satisfy, the eligibility requirements of the early retirement benefit in effect prior to the amendment [here, a reinterpretation], § 204(g) protects the benefit."

Ahng v. Allsteel, Inc., 96 F.3d 1033, 1036 (7th Cir. 1996). Accord Gillis, *supra*, 4 F.3 d at 1145 ("an employer must provide funding for early retirement benefits if there is the possibility that its employees will 'grow into' these benefits at a date after its early retirement plan is eliminated") (emphasis added).

Where, as here, early retirement benefits based upon service time have accrued but are not payable until the participant reaches a specified chronological age, the participant must be allowed to reach that age without losing the benefit:

> "For example, assume Company X provides early retirement benefits upon reaching fifty-five years of age and twenty years of service. . . . If Smith is only forty-five and has not yet met the age requirement Company X still may not amend the benefits. Smith must e given an opportunity to 'grow into' his benefits."

Giannotti, Comment: ERISA's Anticutback Rule and Contingent Early- Retirement Benefits, 68 U. Chi. L. Rev. 1341, 1346 (Fall, 2001).

Rehearing is required to reconcile this case with the "grow into" rule.

4. The Court Based its Decision Upon Demonstrably Incorrect Findings Concerning Integration and Ambiguity.

To further support its restricted review, the Court entered findings that the 1995 Restatement (1) was an "integrated" document, and (2) was devoid of any ambiguity. Slip Op. at 11, 12. The record contradicts both of these findings.

The Court held that the 1995 Restatement "includes all of the amendments through January 1 of that year." Slip Op. at 11. As demonstrated during briefing, however, the 1995 Restatement omitted or misstated both the 1994 Amendment, and an unrelated Plan amendment approved by Hancock later in 1994 (December). Pl. Br. at 45. In its reply brief, Hancock did not offer any rebuttal, thus conceding the point. See

United States v. Teague, 956 F.2d 1427, 1433 (7th Cir. 1992)

Footnotes

n1 The anti-cutback statute was enacted in 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984), for the express purpose of protecting early retirement benefits. E.g., Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1143-46 (3rd Cir. 1993) (in-depth discussion of statute and its history), cert. denied, 511 U.S. 1004 (1994).

n2 The Court also rejected as "constricted" an interpretation of the anticutback statute to permit benefits to be "suspended" post-accrual. Id., 124 S. Ct. at 2236, 2239 n. 5 (suspension allowed only for benefits based on "future" service).

n3 Of course, Hancock remained free to amend the Plan to include the "active service at age 50" requirement for Participants whose rights had not accrued because they had not yet achieved 25 years of service, which it did on December 10, 1997. A01426 ("... assuming he continued to be Employee until such date...."). See also A01531-32 (1998 SPD Update: "If you are working as a John Hancock Associate when you first become eligible for retirement....").

n4 As held by the District Court, deliberate disregard of the SPDs is "an ERISA sin." Dist. Ct. Op. at 13-14, *citing* 29 U.S.C. § 1022(b) (the SPD must include all information that "may result in disqualification, ineligibility, or denial or loss of benefits"), and 29 C.F.R. § 2520-102-2(b) (same).